

August 22, 2014

City of Bloomington Planning Commission
Glen Markegard, AICP, Planning Manager
City of Bloomington
1800 West Old Shakopee Road
Bloomington MN 55431-3027

Re: Auto and Nonconforming Use Ordinance Amendments

Dear Commissioners and Mr. Markegard:

Please accept this letter on behalf of Lupient Automotive Group ("Lupient") requesting modifications to the zoning amendments the City of Bloomington, Minnesota proposes to adopt to implement the Penn American District Plan. Lupient owns and operates the Lupient Chevrolet auto dealership at 1601 Southtown Drive, Bloomington, Minnesota ("Lupient Chevrolet"). Lupient also owns the adjacent lot, 1700 American Boulevard West (the "American Boulevard Lot"), which Lupient acquired for the development of a new auto dealership or expansion of Lupient Chevrolet.

Lupient supports the Penn American District Plan in general, including the vision of higher density transit-oriented development within the District. Lupient objects, however, to the City effectively excluding auto dealerships from that vision. Auto dealerships have defined the character of what the City now calls the Penn American District for the last 50 years. Those dealerships played an important role in the evolution and development of the District. Auto dealerships can and should be a part of the longer term vision for the District.

The District, and particularly the intersection of the 494/35W interchange and American Boulevard, has evolved into an appropriate location for higher density development. The proposed Orange Line Bus Rapid Transit improvements will enhance the development potential by providing a place to transfer from personal transportation to mass transit. The District Plan misses the mark, however, by effectively excluding personal transportation from the mix of uses. In discussions regarding the Orange Line, Metro Transit staff members acknowledged the synergy between the BRT stop and automobile dealerships. Specifically, Metro Transit recognized the potential for transfers from cars to transit and from transit to cars in connection with automobile sales and service facilities. It will be a long time before mass transit replaces the automobile, if it ever will. Mass transit will succeed only as a part of an integrated transportation system that already includes automobiles and auto-dealerships. The District Plan and the zoning amendments should recognize that fact and strive to integrate, rather than eliminate, the dealerships.

Laws affecting auto-dealerships have also evolved. Minnesota Statutes section 80E.14, Limitations on establishing or relocating dealerships, establishes spacing requirements between same-brand dealerships that make it virtually impossible to relocate Lupient Chevrolet anywhere in the Twin Cities Metro area. The Multiemployer Pension Plan Amendment Act of 1980 (MPPAA), which requires funding for pension liabilities associated with significant reductions in union workforce—potentially over \$31,000,000 for Lupient Chevrolet—makes closing the business unaffordable. If the District Plan and the zoning amendments do not allow for growth and evolution, a union dealership that cannot move because of the relocation laws and cannot close because of the pension liabilities will have to linger and decay in place for a long time.

The general direction of the District Plan threatens the long-term existence of all of the auto-dealers in the District. The specific proposed rezoning of the two Lupient properties is a more immediate threat to Lupient. The proposed amendments to Bloomington Code Section 21 and the zoning map would change the zoning district in which the Lupient properties are located from CR-1 to C-4. If rezoned to C-4, Lupient would only be able to maintain the Lupient Chevrolet dealership in its current configuration: a one-story building in the middle of a large surface parking lot, with vehicle storage on the American Boulevard Lot. The only conforming Motor Vehicle Sales use for either Lupient property would be Motor Vehicle Sales: Class (IV), an economically infeasible classification that does not allow on-site display, storage or service of vehicles.

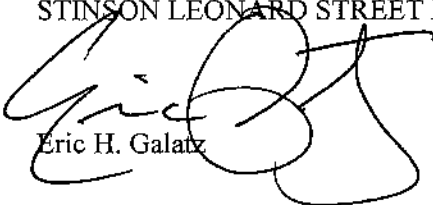
To be sensible and fair, the zoning amendments should (1) allow modest changes to existing dealerships to maintain and improve existing facilities to meet the demands of manufacturers and the market; (2) allow more substantial changes to existing dealerships that bring existing facilities closer to the District Plan vision by increasing building mass, reducing surface parking and accommodating higher density, mixed use development; (3) allow construction of new Class I dealership facilities, with on-site service and vehicle storage that meet the physical parameters and development goals of the District Plan, including higher density, mixed-use and pedestrian-oriented design; and (4) modify Motor Vehicle Class (IV) or create a new Motor Vehicle Class (V) that allows on-site display, service and storage if at least half of the display and storage is fully enclosed. The Lupient properties specifically should be rezoned to the C-1 district, not C-4 as currently proposed. Lupient would then be able to maintain and grow Lupient Chevrolet into a higher-density dealership and develop a new dealership, in a single-use or mixed-use building on the American Boulevard Lot, with the design characteristics that the District Plan envisions.

Attached to this letter are (1) our proposal for alternative amendments to the zoning ordinances and (2) a more detailed discussion of the proposed amendments and their potential impact on Lupient and other auto dealerships in the Penn American District.

The proposed rezoning of the Lupient Chevrolet and constraints on future growth as a "conditional use" will put Lupient Chevrolet out of business and is tantamount to a complete taking of the property. We look forward to working with the City in drafting zoning amendments that will better serve the interests of the City.

Sincerely,

STINSON LEONARD STREET LLP



Eric H. Galatz

**Lupient Automotive Group, Inc.
Proposed Ordinance Amendments**

Lupient proposes that, instead of amending City ordinances to regulate auto dealerships out of existence, the City recognize the value of existing and new auto dealerships and amend its ordinances to allow and encourage renovation and construction of facilities that meet the design standards and mixed use goals of the Penn American District Plan. We propose the following specific changes to the zoning ordinances:

Existing Dealerships

- Rezoning to new Section 21 districts should match existing Section 19 districts as closely as possible (CR-1 to C1, for example) to avoid creating nonconforming uses.
- Existing dealership facilities that become nonconforming uses, structures or lots, must be allowed to continue as lawful nonconforming uses, with the right to maintain, repair, replace, and relocate a similar facility on the same lot, in accordance with Minnesota Statutes section 462.357, subd. 1e.
- Expansion of existing dealership facilities should be allowed a ten percent (10%) expansion as a matter of right in order to comply with changes in market conditions and manufacturer requirements, without restriction on interior modifications that do not affect total building area, and without restriction of the right to relocate on the same lot, subject to review only to determine that any new improvements comply with then-current objective development standards.
- Expansions in excess of ten percent (10%) to existing facilities should be allowed on the basis of findings that such expansion would reduce the level of nonconformity, pursuant to a new Ordinance Section on expansion of nonconforming uses. (See attached.)

New Dealerships

- Create a new Class (V) category of motor vehicle sales for higher density facilities as a permitted use in C-1, C-4 and C-5 Districts:

Class V motor vehicle sales - The sale, brokering, lease or rental of new or used motor vehicles where such vehicles for sale, resale, rental or leasing are stored or displayed on the premises of the business are displayed, serviced and stored primarily within a completely enclosed building on the premises of the business. A Class V motor vehicle sales facility shall conform with the development standards (including floor area ratio (FAR) and gross floor area (GFA)) requirements of the district in which it is located, provided the enclosed floor area of portions of the facility that are used for display, service and storage of vehicles shall be included in the calculation of FAR. Outdoor display and storage of vehicles shall be permitted, subject to compliance with FAR, lot coverage and setback requirements, provided the capacity of the outdoor storage areas shall not exceed the capacity of enclosed storage areas.

Lupient Automotive Group, Inc.
Statement in Support of Alternative Ordinance Amendments

Lupient's History in Bloomington

Lupient has been in the automotive industry since 1950 and has operated the Lupient Chevrolet at its Bloomington location for over 45 years. Lupient plans to continue operations at the Lupient Chevrolet location indefinitely. Those plans include improving and expanding the existing auto dealership at its current location and possibly expanding the Lupient Chevrolet or developing a new auto dealership on the American Boulevard Lot. In fact, Lupient met with the City in March 2014, to discuss the process for obtaining an exception from the moratorium to build a second auto dealership on the American Boulevard Lot. Lupient missed the opportunity to bring a new dealership to the American Boulevard Lot when Lupient determined it would not be possible to get through the approvals process in time to complete the transaction, especially in light of the fact that Lupient would have had to overcome the unfavorable treatment of auto dealerships in the District Plan.

Existing Zoning Code

The two Lupient properties are located in the CR-1 zoning district where "New Motor Vehicle Sales" are allowed as a conditional use. The existing floor area ratio requirements for motor vehicle sales in the C-1 zoning district are zero (0) for existing auto dealerships and fourth-tenths (.4) for new auto dealerships. If not for the current development moratorium, the existing zoning ordinance would allow Lupient Chevrolet to continue and grow on its existing site into the foreseeable future and Lupient would have the right to develop a new dealership on the American Boulevard Lot that would meet the standards of any automobile manufacturer. Rezoning to C-4 as proposed will allow Lupient Chevrolet to continue as a conditional use with very limited expansion rights. Lupient could develop a Class (IV) dealership on either Lupient lot, but Class (IV) is not a viable business model. Rezoning to C-1 would allow Lupient Chevrolet to grow into facility that is compatible with the Penn American District vision. Redefining Class (IV) to allow on-site display, service and storage, would allow Lupient to develop higher density dealerships on both lots.

MnDOT 494-35W Interchange Study

The Minnesota Department of Transportation studies for reconfiguration of the 494-35W interchange contemplates taking of access to the Lupient Chevrolet property from Southtown Drive, which is the front door to the dealership. That taking will require substantial changes to the existing Lupient Chevrolet facilities. The proposed zoning ordinance amendments, which purport to regulate the right to relocate a non-conforming use, will substantially limit alternatives available to Lupient Chevrolet to reconfigure the dealership facility to account for a new entrance to the site, especially higher density alternatives that would otherwise be more consistent with the Penn American Plan.

The City's Proposed Amendments

Rezoning to C-4 deprives Lupient reasonable opportunities to maintain and expand its existing Chevrolet facility or to construct a new auto dealership on the American Boulevard Lot. The amendment presented at the June 9, 2014 City Council study session, proposes to rezone the Lupient properties to a C-4 category. The C-4 zoning would allow Lupient Chevrolet to continue to operate in its current facility only as a conditional use, with very limited expansion rights. The new conditional use for expansion, if adopted as drafted, would effectively deprive Lupient of ordinary statutory non-conforming

use rights and allow Lupient very limited rights to maintain and improve its existing facilities, with no incentive or ability to make changes to its facilities that would be closer to the higher density development the District Plan envisions.

The C-4 zoning would also allow Lupient to construct new Class IV Motor Vehicle Sales facilities on the Lupient Chevrolet site or on the American Boulevard Lot. Unfortunately, as currently defined, the Class IV Motor Vehicle Sales category is an entirely fictitious classification for the “sale of new or used motor vehicles where no such vehicles for sale, resale, rental or leasing are stored or displayed on the premises of the business.” Class IV Motor Vehicle Sales imagines a world in which people will purchase cars from dealerships that cannot show, service, or deliver cars. The only thing a customer could do in a Class IV Motor Vehicle Sales office is look at pictures of cars, reserve a car and deliver payment to someone who cannot deliver a car. We have the internet for that. Even in New York City and Chicago, where densities and land costs justify separating the dealerships from car storage, the showrooms are still in the City with the dealerships.

The Class IV Motor Vehicle Sales category fails to recognize the economic reality of auto dealerships. Automobile maintenance is a significant component of customer service and dealership revenues. A dealership cannot operate without a service facility and few, if any, can afford to have separate locations for its sales and service facilities. Having all dealership personnel in one location also makes it possible for employees, especially managers, administrators and office staff, to fill more than one role. A single facility also facilitates interactions between and among sales, service, finance, and administrative personnel, and between those personnel and customers and vendors.

The Class IV Motor Vehicles Sales category also misses the opportunity to integrate auto sales and service with mass transit. An auto dealership that provides sales, delivery and service at one location adjacent to a BRT stop (or any transit stop) presents its customers with the opportunity to drop off cars for service or trade-in on the way to work, the Mall or the airport, and pick up serviced or new cars on the way home. Separating the dealerships from transit requires extra car trips for sales and service. Separating auto sales from auto service and storage as contemplated by the Class IV Motor Vehicles Sales category, is even more inefficient – requiring trips between the two facilities, doubling dealership occupancy costs, and otherwise depriving the dealership and its customers of the efficiencies of having sales, financing, service, and vehicle delivery staff and services in a single location.

The proposed condition use for expansion, alteration or relocation of auto dealerships would, if enforceable, deprive non-conforming auto dealerships of ordinary statutory protections. Section 21.302.01(k) (“Subsection (K)”) of the proposed amendment would classify existing auto dealerships as conditional uses in the C-4/C-5 districts. Notwithstanding the label, Subsection (K) would effectively provide all existing auto dealerships including Lupient Chevrolet, with less protection than they would have as nonconforming uses under Minnesota Statutes section 462.357, subd. 1e. As proposed, Subsection (K), would unreasonably restrict the ability of Lupient Chevrolet, or any other existing auto dealership, to modify the interior of its existing facility in order to meet the design standards mandated from time to time by the manufacturer or market conditions, or to relocate a same-size structure on the lot to accommodate reconstruction after a casualty or taking.

Subsection (K) is also counterproductive to achieving Penn American District Plan goals. By limiting the opportunity to invest in existing auto dealerships, the City will create a disincentive for those auto dealerships to invest their own resources in the existing facilities, which would result in outdated buildings and possible blight. The plain language of Subsection (K) contravenes the City’s purported objective of allowing existing dealerships to continue to exist while meeting the vision of the Penn American District Plan. The proposed amendment provides that before it issue a conditional use permit for modification to an existing motor vehicle site, the City must find that the proposed modification “will

not substantially delay bringing the site into conformity with . . . the Penn American District Plan . . . given the City's interest in redevelopment of existing motor vehicle sales facilities..." Subsection (K) essentially calls for amortization of auto dealerships, in violation of Minnesota Statutes section 462.357, subd. 1c., which prohibits the amortization of existing uses in most cases.

Damages to Lupient Chevrolet

If Lupient Chevrolet cannot conduct business on the existing site, Lupient Chevrolet will almost certainly have to close. The opportunities for relocation of Lupient Chevrolet is limited by Minnesota Statutes section 80E.14, which establishes spacing requirements between competing dealerships. The current locations of other Twin Cities Chevrolet dealerships effectively block Lupient Chevrolet from relocating to a site outside the Penn American District. If Lupient Chevrolet cannot maintain and grow in its current location, it will eventually be forced to close, resulting in lost jobs, lost tax revenue, and lost services. If Lupient Chevrolet is forced to close and discharge its employees, the business losses could include funding of a currently unfunded union pension liability in excess of \$31,000,000, which would be triggered by a significant reduction in union workforce pursuant to the Multiemployer Pension Plan Amendment Act of 1980. It is likely that the union pension liability will not be resolved for years.

The rezoning and proposed growth constraints are tantamount to a taking because they will deprive Lupient Chevrolet use of its property. The proposed 494-35W Interchange improvements will result in actual takings of access and land. Because Lupient Chevrolet cannot relocate, if the zoning ordinances do not accommodate re-configuration and rebuilding, those takings will be total takings and damages will include loss of the business and the potentially huge pension liability.

The City should pursue alternatives that will allow the City to achieve its development goals in the Penn American District without pushing auto dealers out of the District and out of business.